

BARBARA LAWALL
PIMA COUNTY ATTORNEY
32 N. Stone Avenue, 14TH fLOOR
Tucson, AZ 85701
Telephone: (520) 740-5750
barbara.lawall@pcao.pima.gov
State Bar No. 004906
Law Firm No. 69000

IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of:)	Supreme Court No. R-06-0016
)	
PETITION TO AMEND RULE 1.6)	PETITIONER'S COMMENT IN
OF THE ARIZONA RULES OF)	REPLY TO OPPOSITION TO
CRIMINAL PROCEDURE)	PETITION TO AMEND RULE 1.6
_____)	

Petitioner, Pima County Attorney Barbara LaWall, submits this comment pursuant to Rule 28, Ariz. R. S. Ct., in reply to comments filed in opposition to a portion of her Petition R-06-0016. Those comments in opposition all concern a portion of the proposed amendment to Rule 1.6, Ariz. R. Crim. P. that would include initial appearances among those proceedings as to which the judge would have discretion to use video-conferencing.

Under the current Rule 1.6 adopted in 2000, video-conferencing already is permitted for initial appearances and other types of hearings; however, it is up to the accused suspect, rather than the judge, to determine whether an initial appearance or other type of hearing can be conducted via video-conference.

Before the rule change petition was filed, video-conferencing had been used in Pima County for initial appearances for a number of years. For a time, it was used at virtually all

initial appearances. However, after a new public defender was appointed, he began to urge all his clients accused of felonies to object to video-conferencing. As a result, only misdemeanor initial appearances have been conducted via video-conferencing for the past several years.

Some of the female judges in Pima County refused to go into the courtroom inside the jail to handle the felony initial appearances once they were no longer handled via video-conferencing. These judges cited fear for their safety and security. For the same security reasons, the Pima County Attorney has directed her deputy prosecutors to appear via video-conferencing, rather than entering the jail courtroom where the judge and the defendant are physically present.

The Pima County Attorney believes it should be the judge's decision, rather than the defendant's decision, whether video-conferencing is appropriate for initial appearances. Video-conferencing for initial appearances can save time, save money, provide more safety and security to those participating, and can make it possible for victims to participate without having to travel to the jail or the courthouse. For example, it would allow victims in Ajo to attend the five-minute initial appearance without having to travel six hours round-trip.

The Supreme Court last year appointed its Criminal Rules Video-Conference Advisory Committee to study a variety of legal, technical, and other issues raised in comments concerning the petition. Petitioner, the Pima County Attorney, accepts and approves all the recommendations of that Committee and lauds the Committee for its excellent report.

A great deal of the Committee's discussion and research centered upon the constitutionality of granting judges the discretion whether to hold initial appearances via video-conferencing. Having considered all of that research and all of that discussion, as well as the comments filed in opposition to this portion of the petition, the petitioner is persuaded that there

is no constitutional impediment to granting judges the discretion to hold initial appearances via video-conferencing and maintains her request that Rule 1.6 be amended to grant judges this discretion.

The initial appearance is *not* a proceeding at which witnesses testify; nor is it a proceeding at which the accused suspect presents his defenses to the charges against him. Pursuant to Rule 4.2, Arizona Rules of Criminal Procedure, the initial appearance consists of eight separate parts. In practice in Pima County, these parts are divided into two phases: the probable cause phase and the conditions of release phase.

During the first phase, the Court hears, from a law enforcement officer, the facts that serve as the basis for a determination whether probable cause exists. The prosecutor does not attend the probable cause phase, nor has defense counsel yet been appointed during this phase. Although the Officer presents evidence to the Court, it is of the type presented to the Grand Jury or to a magistrate requested to issue an arrest warrant, not of the type admissible at trial. There is no confrontation by the defense during this phase. If the Court finds there is no probable cause, the suspect is released. If the Court finds probable cause, it proceeds to the second phase of the Initial Appearance.

During the second phase, the suspect is informed of the charges against him and of the right to counsel, and he is appointed counsel if he is eligible and makes a request under Rule 6. After counsel is appointed, the Court hears comments (not testimony) offered by the victim, either orally or in writing, concerning the conditions of release. The Court also hears comments in the form of recommendations or arguments, not testimony, from a liaison with the probation department and from the prosecutor and the defense attorney. The judge may inquire of the suspect whether he understands the conditions of release and may answer questions presented by

the suspect or respond to comments by the suspect; however, the suspect is not sworn, and the judge does not hear any testimony from the suspect. The Court then sets the terms and conditions of release – in most cases setting bail at a certain dollar amount.

There are two constitutional provisions that have been considered in connection with the question whether a judge should have authority to determine that initial appearances can be conducted via video-conferencing: the Confrontation Clause and the Due Process Clause – along with their parallel provisions in Article II, section 24 of the Arizona Constitution guaranteeing a defendant’s rights to “appear and defend in person,” and “to meet the witnesses against him face to face.” Under the proposed revisions to Rule 1.6, the Confrontation Clause and the Arizona Constitution’s parallel right to meet witnesses “face to face” are not implicated because the types of hearings at which judges would have discretion to use video-conferencing, including initial appearances, do not include any in which witness testimony is presented. Thus, only the Due Process Clause and the Arizona Constitution’s parallel right to appear and defend in person potentially could be implicated.

This Court addressed these provisions, though not in the context of video-conferencing, in *State v. Schackart*, 190 Ariz. 238, 947 P.2d 315 (1997). In *Schackart*, this Court recognized that an accused’s presence at trial is protected by the Sixth and Fourteenth Amendments to the United States Constitution and by Article II, section 24 of the Arizona Constitution, and this Court adopted the view that a defendant also has a right to attend those proceedings, apart from trial, where “his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.”

The initial constitutional question is whether video-conferencing can be considered “presence?” If so, the inquiry ends there. A number of courts in other states have held that

video-conference proceedings can be the functional equivalent of in-court proceedings, so that an accused's presence via video-conferencing is presence "in person." In approving the Committee's recommendations, Arizona would not be alone in permitting judges to hold initial appearances via video-conferencing. This is also done in New Hampshire where the state supreme court found no evidence to suggest that the use of video-conferencing adversely biased the judge's opinion of defendants or prejudiced defendants in any way. *Larose v. Superintendent, Hillsborough County Corr. Admin.*, 702 A.2d 326 (N.H. 1997). Similar rulings from other states are set forth in the Majority Report at 13-15. Petitioner notes that the Maricopa County Superior Court also characterizes videoconferencing as the "functional equivalent of being physically present." 7/14/09 Comment at 2:6-7.

If one does not consider presence via video-conferencing to be the functional equivalent of presence in the same room, the constitutional question then becomes whether, at an initial appearance, the suspect's presence in the same room as the judge, as distinct from presence via video-conference, has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge. The answer must be no.

Initial appearances are not proceedings at which defenses to the charge are even at issue. And the video-conference appearance of the defendant at his initial appearance does not substantially affect his ability at later substantive proceedings to defend against the charge. In Maricopa County, and in all but two counties, the public defender does not participate in any way at initial appearances. These are not critical stage proceedings that could be dispositive of the ultimate issues in the case. Accordingly, under the proposal whereby judges have discretion to hold initial appearances via video-conferencing, there is no denial of the right to attend in

person the trial or proceedings where the defendant's ability to defend against the charge is implicated.

The requirements in the proposed Rule change, that the interactive audiovisual system used by the court must enable the court and all parties to view and converse with each other simultaneously, along with the other requirements set forth in the proposed Rule change, ensure that Due Process concerns are addressed. And, certainly, to the extent that unusual circumstances are present, the judge can be trusted to determine whether video-conferencing would be inappropriate. In other words, to the extent that there are technical problems that impede the judge and those present from seeing or hearing one another, the judge could determine that video-conferencing should not be used until the technical problems are resolved.

The propriety of using video-conferencing for initial appearances is something the judge should be able to determine on a case-by-case basis. There should be no blanket prohibition against the use of video-conferencing for initial appearances in the absence of a defendant's consent.

Accordingly, petitioner, the Pima County Attorney, respectfully requests that this Court approve her petition in the amended form recommended by the Criminal Rules Advisory Committee.

RESPECTFULLY SUBMITTED this __ day of July, 2009.

BARBARA LAWALL
PIMA COUNTY ATTORNEY

